
IN THE
United States
Court of Appeals
For the Ninth Circuit

G. A. MILLER, W. W. LORD, RALPH SMEED,
L. H. STAUS and JACK SMEED, Trustees of
John W. Smeed Estate,
Appellants,

vs.

SAM WAHYOU, DIAMOND-S RANCH CO., SAM
WAHYOU, K. R. NUTTING and THOMAS G.
LEE as Trustees for the assets of Diamond-S
Ranch Co., THOMAS G. LEE, TOY QUONG,
JOE SIN, K. R. NUTTING, YIP K. TOON and
HERBERT JANG,
Appellees.

*Appeal from the United States District Court
for the District of Nevada*

APPELLANTS' REPLY BRIEF

SMITH & EWING,
Residing at Caldwell, Idaho,
CARVER, McCLENAHAN & GREENFIELD,
Residing at Boise, Idaho,
PIKE & McLAUGHLIN,
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Attorneys for Appellants.

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PAUL P. O'BRIEN, C

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SUBJECT INDEX

| | Page |
|-------------------|------|
| I Statement | 1 |
| II Argument | 3 |

TABLE OF AUTHORITIES CITED STATUTES

| | Page |
|--|------|
| General Corporation Law of 1925 of Nevada as amended, Section 66, Paragraph 1665 | 4 |
| Uniform Stock Transfer Act, 1945 Nev. S.L., Ch. 188, Section 22 (1). (N.C.L. Sup. 1943-1948, Section 1854.21, Section 22 (1) | 4 |

TEXTS

| | |
|---|---|
| 12 Fletcher, Cyc. of Corp. (Perm. Ed.) 231, Section 5461 .. | 4 |
| 16 Fletcher, Cyc. of Corp. (Perm. Ed.) 870, Section 8129 .. | 3 |



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APPELLANTS' REPLY BRIEF

I

STATEMENT

Because the appellees' brief is framed around theories not supported by fact, law, or logic, this

reply brief is submitted. The fallacy of the arguments made in appellees' brief is apparent in a simple restatement of the points upon which they rest. An analysis of their brief shows reliance on these propositions:

a. That corporate stock continues to have the aspect of property after dissolution of a corporation.

b. That a revival of a corporation as of the date of dissolution can effectively erase intervening rights, acquired from persons equitably entitled to an interest in the assets of the corporation (as distinguished from a stock interest) during the period the corporation was dissolved;

c. That a trustee under a trust created by statute can retain the interest of a beneficiary of the trust acquired for his own account, as against the assignee of such beneficiary, if

1. the trust is subsequently terminated by revival of the corporation; or if

2. The assignee does not choose to pay off the personal indebtedness of the beneficiary to the trustee;

d. That the Uniform Stock Transfer Act applies to the stock of a dissolved corporation, and that certificates in a dissolved corporation must be endorsed and transferred exactly as during corporate existence;

e. That representation of both the beneficiary of a trust and the trustee of a trust by the same at-

torney does not constitute evidence of fraud, as to a creditor-assignee of the beneficiary;

f. That the powers of the corporate entity during the three year winding up period are involved in this case in some manner.

The crucial question is:

CAN SAM WAHYOU, WHILE A TRUSTEE OF THE ASSETS OF THE DISSOLVED CORPORATION, CUT OFF THE RIGHTS OF CORBARI, AND CORBARI'S ASSIGNEE, BY A PURPORTED SALE AND PURCHASE OF STOCK CERTIFICATES, WHICH HE ACQUIRED AFTER THE DISSOLUTION BY PAYING OFF THE BANK TO WHICH THEY HAD BEEN PLEDGED?

Appellants contend that the most Wahyou could acquire would be the equitable right of reimbursement for the amount he paid for the certificates in the expired corporation; more likely, because he is a trustee, he must be held to strictest accountability, and be treated as a volunteer in paying the bank.

II

ARGUMENT

That the transferable character of corporate stock is destroyed by dissolution is universally recognized.

16 Fletcher. Cyc. of Corp. (Perm. Ed.) 870, §8129.

Nothing in the Uniform Stock Transfer Act applies to the stock in a dissolved corporation, the references being entirely to an "organized" corporation.

Uniform Stock Transfer Act, 1945 Nev. S. L., Ch. 188, §22(1). (N.C.L. Sup. 1943-1948, §1854.21, §22(1)).

"After a corporation has been dissolved . . . , the stockholders have not the same power to transfer the legal title to their shares as before the dissolution, for their position is very different. After the dissolution of the corporation, their only right is an equitable right to share in the assets of the corporation after the payments of its debts and after they have paid or been charged with any indebtedness which may have been due from them to the corporation. This equitable right may be assigned, but in such a case the assignee acquires no greater or different rights than the assignor."

12 Fletcher, Cyc. of Corp. (Perm. Ed.) 231, §5461.

Wahyou was a trustee under Section 66 of the Nevada corporation law when he paid off the bank, and acquired the pledged stock. As a trustee, his duties with reference to Corbari were prescribed in the statute. He was to divide the moneys and other property, real and personal, among the stockholders, after making adequate provision for payment of the debts of the dissolved corporation. He

paid off the pledge and purported to acquire the pledged stock while this was the exact measure of his duties—can appellees argue that dealing on his own account, wrongful when done, becomes proper at some later time, as against intervening rights?

Appellants have no concern with whether the Nevada corporate revival statute is unconstitutional generally—it is an unconstitutional application of it, in any event, retroactively to invest with virtue the acts of trustees wrongful when done, to the detriment of creditors of beneficiaries of the trust whose interests intervened.

The duties of the trustee are measured, as stated, by the statute. When the corporation was dissolved the bank holding the pledged stock had no longer a legal interest, but an equitable interest, and that is all the interest that Wahyou could acquire when he paid off the bank. If when he paid off the bank he had been a stranger and not a trustee, he would have been equitably entitled to be reimbursed; he would have had an equitable lien on Corbari's property rights as specified in the dissolution statute—the right to receive a share in the real and personal property after the corporate creditors have been provided for. This lien could have been foreclosed as against the creditors who took a legal assignment of these property rights during the period of dissolution.

But he was not a stranger—he was a trustee for the benefit of Corbari, and other stockholders. He wasn't buying stock, for there was no stock. He couldn't deal on his own account with the trust prop-

erty for such an idea is repugnant in our legal system.

He doesn't, apparently, seriously controvert the trust principles involved. His answer is that the corporation has since revived. It is, he says, as if the corporation had never been dissolved. Whatever may be the situation as to the corporation as a corporation, nothing in the revival statute says that a trustee can avoid his liability for wrongfully dealing with trust property after revival. The trustee's conduct is separately measured. This trustee now holding a doubled interest in the corporation, says that his actions in cutting Corbari out are unassailable because of the revival. The revival has nothing to do with his liability arising out of his wrongful conduct as a trustee. He is liable, in any event.

The appellees' motion for summary judgment should have been denied, and the appellants' motion for summary judgment should have been granted.

Respectfully submitted,

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